

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FIFTH THIRD BANK,

Plaintiff-Appellant,

v

MARGARET BERNITT,

Defendant-Appellee.

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UNPUBLISHED

June 22, 2006

No. 267362

Oakland Circuit Court

LC No. 05-068298-CK

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion for summary disposition and dismissing the case on the ground that the suit was barred by the doctrine of res judicata. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties in this case were also opposing parties in two prior lawsuits. The first lawsuit was a quiet title action filed in 2001 by defendant.<sup>1</sup> In that case, defendant requested that the court determine she was record title owner of a piece of land and quiet title in her favor despite her son and then daughter-in-law living in a mobile home on the property and despite Fifth Third's predecessor, Old Kent Bank, holding a future advance mortgage concerning the real estate. The signatures on the mortgage appeared to be those of defendant's son and then daughter-in-law, as well defendant herself.

The 2001 case led to a default judgment against Fifth Third's predecessor for failure to appear, plead, or otherwise defend the case. On November 30, 2001 judgment quieting title in favor of defendant and determining that defendant was owner "of the land and premises in fee simple by a title, perfect as against the defendants in this suit." The judgment was amended in August 2003 to change the legal description of the real estate.

In 2003, defendant filed another complaint against plaintiff. The 2003 complaint sought a declaratory judgment to stop plaintiff from foreclosing on the property or seeking collection from her. That case was dismissed in 2004 due to a failure to timely serve the complaint.

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<sup>1</sup> While the 2001 case was actually initiated by defendant and her husband, all references to that case and its decision will refer only to defendant as an individual because her husband is now deceased, and she is the surviving litigant.

The present case, filed in August 2005, requests damages against defendant due to breach of mortgage, fraud, negligent misrepresentation, and unjust enrichment. Defendant asserted the affirmative defense of res judicata in light of the 2003 amended judgment quieting title in favor of defendant. Plaintiff moved for summary disposition. The trial court held that the doctrine of res judicata applied, and therefore denied plaintiff's motion and dismissed the case.

Both summary disposition decisions and applications of res judicata are reviewed de novo as questions of law. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).

Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on the merits. [*Id.*, (internal citations omitted).]

The following four factors must be met for the doctrine of res judicata to apply: “(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003). Additionally, res judicata applies to default judgments. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

This is the third action between these two parties. The second action, initiated in 2003, was not decided on the merits because it was dismissed for a failure to serve Fifth Third. Accordingly, res judicata does not apply based on the 2003 case and the trial court erred when it stated that the 2003 amended judgment granted judgment on the 2003 complaint.

The initial 2001 action, however, resulted in a default judgment against plaintiff's predecessor and a final judgment that stated defendant was “owner[] of the land and premises in fee simple by a title, perfect as against the defendants in this suit.” Therefore, three of the four factors in the res judicata analysis have been met because res judicata applies to default judgments, a default judgment was entered against plaintiff's predecessor, and a final judgment was entered.

The only factor in question is whether the current matter contested, relating to plaintiff's rights surrounding the mortgage and defendant's alleged signature on that mortgage, could have been resolved in the 2001 case. The 2001 case determined not only that defendant was the owner of the property, but also that her title was perfect against plaintiff's predecessor. Perfection of title plainly relates to whether any interest was granted under a mortgage. Because the trial court in the 2001 case addressed interests that related to the mortgage, plaintiff's interests and arguments relating to that mortgage could have been raised in that case. Therefore, factor three of the res judicata analysis was also met, and the doctrine of res judicata applies to bar the present action. *Peterson Novelties, supra* at 10.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Jane E. Markey  
/s/ Patrick M. Meter